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In the Supreme Court of the United States

OCTOBER TERM, 1978

JACKSON SAWMILL COMPANY, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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1. In 1956 petitioners purchased bonds issued by the City of East St. Louis, Illinois, to finance improvements to the Veterans Memorial Bridge (later renamed the Martin Luther King Bridge). The bond issue provided that principal and interest would be repaid entirely from tolls and other bridge revenue. Traffic over the bridge gradually declined, however, and revenue was insufficient to meet the payments to the bondholders. The City defaulted on the bonds on January 1, 1974. Pet. App. A-2 to A-4.

Petitioners brought this action in the United States District Court for the Eastern District of Missouri against the United States, the City, the States of Illinois and Missouri, and various local, state and federal officials. The crux of their complaint was that the decline in traffic over the King Bridge had been caused by the opening in 1967 of the Poplar Street Bridge, a free bridge nearby,

and that the City had violated its agreement, made as part of the 1956 bond issuance, that it would not permit construction of any competing bridge within City limits. The United States was named a defendant because, according to the complaint, it played a central role in the financing and construction of the Poplar Street Bridge and thus took the petitioners' property without compensation (Pet. App. A-55), and because its involvement "impair[ed] * * * the obligation of [the] contract" between the bondholders and the City not to permit construction of a new bridge, in violation of the Contract Clause and the Fifth Amendment. Petitioners sought "just compensation" on the first count and damages on the second (Pet. App. A-55 to A-57).

The district court dismissed the action against the United States because it found that petitioners did not have a constitutionally-protected property interest in the traffic flow across the King Bridge, and thus the diversion of the traffic to the Poplar Street Bridge was not a compensable taking of property (Pet. App. A-60). It dismissed the Contract Clause claim because that Clause "is only a limitation of state powers. No cause of action based on this theory lies against the United States government" (Pet. App. A-63).[1]

The court of appeals affirmed (Pet. App. A-1 to A-19). On the taking claim, the court of appeals held that, even considering the claim to be one for direct damage to petitioners' "vested property rights" (Pet. App. A-8), "[t]he United States acquired no property interest from [petitioners] entitling them to compensation regardless of the label attached to the [petitioners'] contract rights with the City" (Pet. App. A-10). On the Contract Clause claim, the court of appeals held that, even assuming that the

[1]The district court dismissed the complaint against the other defendants as well. See Pet. App. A-58.

Contract Clause applies to the federal government through the Fifth Amendment, "[t]he federal government took no action that 'impaired' the contract between [petitioners] and the City in a constitutional sense" (Pet. App. A-18). The court of appeals concluded that petitioners "have confused impairment of performance of a contract with impairment of the obligation of the contract. The Constitution does not provide a federal action for simple breach of contract" (Pet. App. A-18 to A-19).[2]

2. The essence of petitioners' contention that the United States took their property without just compensation is that the United States' support and financing of a new free bridge near the King Bridge "destroyed the [petitioners'] property rights" as effectively as if the United States had destroyed the old bridge (Pet. 9). It is no doubt true that motorists prefer new free bridges to old toll bridges. But that preference does not transform the government's action into a taking of petitioners' "property." Petitioners do not suggest that the United States restricted the motorists' ability to use the old bridge; they argue simply that the United States provided an economically attractive alternative. Competition often harms the interests of some competitors, but competitive injury is not a "taking" of anything but the customers' favor. And even if petitioners had a "property interest" in the flow of traffic over the King Bridge (a dubious assumption in light of cases such as *United States* v. *Willow River Co.*, 324 U.S. 499 (1945)), the United States took no action that could be considered a regulation or restriction of that traffic flow. Motorists were as free to use the King Bridge after 1967 as they were before then. Their apparent choice to use it less often has

[2]The court of appeals affirmed the district court's dismissal of the complaint against all defendants. It noted, as had the district court, that "the City may well have breached its contract with" the petitioners (Pet. App. A-18). However, no such claim was pleaded in this action.

led to the souring of petitioners' investment. But the Fifth Amendment does not require compensation for "conse quential injuries resulting from the exercise of lawful power." *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 551 (1870). See *Tennessee Power Co.* v. *Tennessee Valley Authority*, 306 U.S. 118, 137-138 (1939). The petitioners have alleged no more than that here, and the courts below properly held that they had stated no cause of action against the United States.

3. Petitioners are likewise unable to establish a violation of the Contract Clause. Their complaint is that the United States' action in sponsoring the new bridge "impair[ed] * * * the obligation of [the] contract" between petitioners and the City not to allow construction of any new competing bridge (Pet. App. A-57). But, as the court of appeals held (Pet. App. A-18), whatever petitioners alleged the United States to have done, it did not "impair the obligation" of the contract. The United States was not the obligor on the bond contract. If the City breached the contract, it can be held liable in damages in an appropriate action. The City's *obligation* to the bondholders was unaffected by the opening of the new bridge. Even if the Contract Clause applies to the United States, that Clause plainly does not transform every breach of contract into a constitutional violation. As this Court stated recently in *Allied Structural Steel Co.* v. *Spannaus*, No. 77-747 (June 28, 1978), slip op. 10, the *sine qua non* of a Contracts Clause violation is a deliberate "alteration of contractual obligations." No such alteration was pleaded here. See Pet. App. A-56.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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